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NO. 356

In the Supreme Court of the United States

OCTOBER TERM, 1932

INDIAN TERRITORY ILLUMINATING OIL COMPANY, *Petitioner*,

VERSUS

BOARD OF EQUALIZATION OF TULSA COUNTY, OKLAHOMA, *Respondent*.

SUPPLEMENTAL BRIEF OF PETITIONER

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vs.

BOARD OF EQUALIZATION OF TULSA COUNTY, OKLAHOMA, *Respondent.*

SUPPLEMENTAL BRIEF OF PETITIONER

STATEMENT

Petitioner adopts its Brief in Support of Papers Whereon Appeal Was Allowed as Petition for Writ of Certiorari, as herein supplemented, as its brief on the merits.

The question involved is whether 51,630 barrels of crude oil of the petitioner contained in certain storage tanks located in Tulsa County, Oklahoma, on January 1, 1929, was subject to assessment for ad valorem taxation by the State of Oklahoma and the municipalities thereof, for the year 1929 (R. 31). The crude oil involved constitutes the petitioner's share of oil (seven-eighths of the whole) which was produced by the petitioner from the allotted lands of certain restricted Seminole Indians (one of the Five Civilized Tribes) under leases approved by the Secretary of the

Interior under rules and regulations approved by him pursuant to Section 2 of the Act of May 27, 1908 (See Appendix V). The leases were all in the same form. One of them appears in the record (p. 21). The crude oil was produced during the period from March 31, 1927, to June 16, 1927, and was run into the storage tanks located in Tulsa County, which tanks were purchased on March 14, 1927, for the purpose of storing such oil and also other oil. On January 1, 1929, the tanks contained 172,747 barrels.

The 121,117 barrels of oil contained in the tanks in addition to the 51,630 barrels here involved, included the Indians' share (one-eighth of the whole) produced from the restricted land, which has been acquired by petitioner by settlement with the Superintendent of the Five Civilized Tribes, and all that which had been produced by petitioner from other lands under leases, known as "commercial leases," over which the United States Government had no control. It is not claimed that the oil contained in the tanks other than petitioner's share of that produced from the restricted Indian lands was not subject to taxation. Such other oil, including the share originally belonging to the Indians, was all regularly listed by the petitioner for taxation, assessed and the taxes levied thereon paid without protest.

It is the contention of the petitioner that under the leases approved by the Secretary of the Interior, it became an agency or instrumentality of the Government of

the United States for the development and use of the restricted land of its Indian wards for their benefit, and the 51,630 barrels of crude oil being the petitioner's share of the product specified in the leases, could not be lawfully taxed by the State while held by the petitioner in its original form prior to sale.

The petitioner's contention was sustained by the State District Court (R. 30). But on appeal the State Supreme Court held the oil involved subject to taxation by the State (R. 38).

THE JURISDICTION

This Court having granted a writ of certiorari to review the decision of the Supreme Court of the State, it is unnecessary to give further consideration to jurisdictional questions.

SPECIFICATION OF ERRORS

The specification of errors relied upon for reversal has been quoted at pages 13 to 16 of Brief in Support of Petition for Writ of Certiorari.

ARGUMENT

Supplementing the argument on the merits contained in the Brief in Support of Petition for Writ of Certiorari heretofore filed herein, it is respectfully submitted:

Point One

The petitioner as lessee of restricted Seminole Indian lands, under leases approved by the Secretary of the Interior pursuant to rules and regulations prescribed by him, is an agency or instrumentality employed by the Government of the United States in performing the governmental duties it has assumed to its Indian wards for the development of their allotted lands for oil and gas and the production of the same therefrom for their benefit.

Act May 27, 1908 (35 Stat. L. 312) (Appendix V);

Jaybird Mining Co. v. *Weir,* 271 U. S. 609;

Gillespie v. *Oklahoma,* 257 U. S. 501;

Indian Territory Illuminating Oil Co. v. *Oklahoma,* 240 U. S. 522;

Choctaw O. & G. R. Co. v. *Harrison,* 235 U. S. 292.

See, also:

Large Oil Co. v. *Howard,* 248 U. S. 549;

Howard v. *Oil Companies,* 247 U. S. 503.

The Supreme Court of the State so holds:

Large Oil Co. v. *Howard,* 63 Okla. 144, 145;

In re. Skelton Lead & Zinc Company's Gross Production Tax, 81 Okla. 135, 138.

COMMENT:

Some of the leases involved in *Howard* v. *Oil Companies,* 247 U. S. 503, were in the same form and executed under the same authority. Some of the leases from which the net income involved in *Gillespie* v. *Oklahoma,* 257 U. S.

501, were upon Creek Indian lands which were under the same restrictions as those imposed on Seminole Indians by the Act of May 27, 1908, and those leases were executed by authority of the same Act as the leases here involved.

Point Two

The States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control or affect, in the slightest degree, the operation of the constitutional laws enacted by Congress for the purpose of carrying into execution the powers vested in the Government of the United States, and cannot tax to any extent the instrumentalities and agencies of the Federal Government, nor the means employed by Congress to carry into effect the powers conferred by the Federal Constitution; and any tax imposed or any attempt to impose a tax therefor or thereon, no matter how reasonable or how universal and undiscriminating, is repugnant to the Constitution of the United States.

M'Culloch v. *Maryland,* 4 Wheat. 316;

Weston v. *Charleston,* 2 Pet. 449;

Brown v. *Maryland,* 12 Wheat. 419;

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Jaybird Mining Co. v. *Weir,* 271 U. S. 609.

In *Johnson* v. *State of Maryland,* 254 U. S. 51, 55, re-

ferring to the powers of the State over Federal agencies or instrumentalities, this Court said:

> "With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the State's inability to interfere has been regarded as established since *McCulloch* v. *Maryland,* 4 Wheat. 316, 4 L. ed. 579. The decision in that case was not put upon any consideration of degree, but upon the entire absence of power on the part of the States to touch, in that way, at least, the instrumentalities of the United States (4 Wheat. 429, 430), and that is the law today. *Farmers & M. Sav. Bank* v. *Minnesota,* 232 U. S. 516, 525, 526."

Point Three

The rule which obtains in Oklahoma, is that while a lease of land for oil and gas mining purposes does not vest in the lessee title to the oil and gas in place, it does grant to the lessee an interest in the land.

Rich v. *Doneghey,* 71 Okla. 204, 3 A. L. R. 352.

Point Four

Although the leases by which petitioner is authorized to develop the restricted Indian lands and produce oil therefrom, are property within the territorial jurisdiction of the State, they may not be directly taxed as such by the State. "A tax upon the leases is a tax upon the power to make them and could be used to destroy the power to make them."

Indian Territory Illuminating Oil Company v. *Oklahoma,* 240 U. S. 522, 530.

Point Five

The net income derived by a lessee from the sales of his share of the oil received under such leases is not subject to taxation.

Gillespie v. *State of Oklahoma,* 257 U. S. 501;

Burnet v. *Coronado Oil & Gas Company,* 285 U. S. 393.

COMMENT:

It is well settled that a tax on the income of property is a tax upon the property itself. The decision of this Court on the point stated, would seem to be the inevitable conclusion from the decision in *Indian Territory Illuminating Oil Co.* v. *State of Oklahoma,* 240 U. S. 522, rendered in 1916, holding that the power of the State to directly tax such leases without the consent of Congress cannot be admitted. It was pointed out in the opinion of the court in the Burnet case, that "the opinion in Gillespie vs. Oklahoma, * * * has often been referred to as the expression of an accepted principle." Eleven of the decisions of this Court so accepting the principle were cited.

In dissenting opinions it was said that the decision in the Gillespie case should be overruled. We respectfully suggest that such cannot consistently be done, without also overruling *Indian Territory Illuminating Oil Co.* v. *State, supra; Howard* v. *Gypsy Oil Co.,* 247 U. S. 503, and *Large Oil Co.* v. *Howard,* 248 U. S. 549. The wisdom of the gen-

eral policy of *stare decisis,* even where the error is a matter of serious concern, will not be questioned. It has been suggested, however, that where a correction cannot be had by legislation as in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. In that connection may we respectfully call attention to the fact that it is an easy matter to permit state taxation of Federal agencies and instrumentalities by legislative action. All that is required is an Act of Congress. Congress has given such consent, as to minerals produced from restricted Indian lands of the Five Civilized Tribes subsequent to April 26, 1931, by Act of May 10, 1928, 45 Stat. L. 495, as amended by 46 Stat. L. Ch. 179 (Appendix VI). Under that act oil now produced from restricted Indian lands of the Five Civilized Tribes by lessees as agencies or instrumentalities of the Federal Government and the net income therefrom is subject to and is taxed by the State. Similar legislation has been enacted as to other tribes. See Sec. 5, Ch. 120, 41 Stat. L. 1250.

Overruling any of these decisions would have no practical effect so far as future production and incomes derived therefrom is concerned. The only appreciable effect would perhaps be to open the way to very large numbers of claims for back taxes on gross production, oil in tankage on the leased premises and incomes, that have been regarded as definitely settled by these decisions for from ten to sixteen

years. We respectfully submit that the wisdom of adherence to the policy of *stare decisis* under these circumstances should commend itself to those who now entertain a contrary opinion to that heretofore entertained and expressed by a majority of the Court.

Point Six

A tax on the gross value of the share of a lessee of restricted Indian lands, of the oil produced, would retard, impede and burden the United States in the exercise of its governmental function, in a greater degree and in a more direct manner, than would a tax on the net income derived from sales of his share thereof.

COMMENT:

It is manifest that a tax laid upon the gross value of oil produced, may be more burdensome than a tax laid on the net income from the sales of such oil, which is the gross receipts therefrom, less all proper development and operating costs, depletion allowances, depreciation and the like. Taxation of net incomes cannot exceed in amount the profits realized, while taxation of the gross value of oil produced may be extended to such limits that production could only be had at an actual loss and thus force abandonment thereof to the detriment of the Indian wards of the Government.

In *United States Glue Company* v. *Oak Creek*, 247 U. S. 321, 328, this Court said:

"The difference in effect between a tax measured by

> gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude, and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large."

It is evident that a tax on the gross value of the lessee's share of oil and gas produced under an oil and gas mining lease is a tax upon the gross income or gross receipts of the lease. A tax on the gross receipts arising from the conduct of interstate commerce has been held invalid because it is a direct burden on such commerce and could be used to destroy it (*Philadelphia & S. Mail S. S. Co.* v. *Pennsylvania,* 122 U. S. 326; *G H. & S. A. R. Co.* v. *Texas,* 210 U. S. 217), while a tax on the net income arising from the conduct of interstate commerce has been allowed on the theory that at most it is only a remote burden on such commerce (*Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113). If the same rule should be applied to agencies or instrumentalities of the Federal Government, it might result in the conclusion that a tax on the net income of a lessee from sales of his share of the oil and gas produced would not be an unwarranted interference with the functions of the Federal

Government upon the part of the State, but would certainly result in the conclusion that a tax upon the gross value of the lessee's share of the oil would be a direct burden and could be used to destroy the power of the Government to secure development of the lands of its Indian wards through the instrumentality of lessees.

In the Gillespie case this Court pointed out that it is well understood that a certain amount of reaction upon and interference with interstate commerce cannot be avoided if the states are to exist and make laws and that the criterion of interference by the states with interstate commerce is one of degree. In holding that the rules with reference to interference with interstate commerce were not applicable to instrumentalities of the United States, this Court held in the Gillespie case that the rule as to such instrumentalities is absolute in form and at least stricter in substance than the rule as to interstate commerce. The court, therefore, concluded in effect in the Gillespie case, that although the tax on the net income of a lessee from sales of oil and gas produced was less in degree and more remote than a tax upon the gross receipts (the gross value of oil produced), such tax could not be imposed by the State.

In yet another way would the burden be more direct and greater in degree. On account of the fugacious nature of oil and gas, as aptly described by this Court in *Ohio Oil Co.* v. *Indiana*, 177 U. S. 109, the owner of the land overlying an oil and gas pool, in order to recover his share of the

oil and gas must not only have a number of wells on his side of the dividing property line equal to those on the opposite side, but they must also be operated to the same extent as the wells on the adjacent properties.

The characteristic of oil and gas mentioned, has given rise to what are known as the implied covenants of those oil and gas leases in which the lessor receives a share of the product, which, in the absence of controlling express covenants, are recognized by the courts without exception. Among the implied covenants, as universally recognized, are the implied covenant to fully develop, to protect the leased premises from drainage by drilling offset wells, and for diligent and proper operation. See *Brewster* v. *Lanyon Zinc Co.*, 72 C. C. A. 213, 140 Fed. 801.

Ordinarily when transportation and marketing facilities and market demands are adequate, no difficulty arises over the covenant for diligent and proper operation. It is usually as much to the interest of the lessee as to the lessor to produce and market all the oil he can. But under conditions that have prevailed in this country for the past few years, and particularly in the Seminole field in Oklahoma during the period shortly prior to the application and enforcement of the State's proration laws (See *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210) when the oil in question was produced, production of oil far exceeded the market demands. Non-integrated producers of oil, such as the petitioner, who are without refineries, and

dependent on the general market for disposition of their product, were then compelled to either permit the premises leased by them to be drained, or produce the oil as rapidly as others and store it above ground until it could be marketed. It was of course to the interest of the United States under such circumstances in the discharge of its obligation to its Indian wards, that loss by drainage be not suffered, but that the oil be produced, run into storage, and settlement made for the Indian's share. Anything which would burden or hamper such production and storage, would necessarily interfere with the performance of the governmental function of fully protecting the interest of the Indian ward. At best the storage of oil is not an attrative proposition for a producer. The proper storage facilities are expen sive. In the most modern steel tankage there is some loss by evaporation, and deterioration in quality. Capital investment in the oil and the storage facilities are frozen and bring no returns. Non-integrated producers, produce and store oil above ground as a matter of necessity to prevent loss by drainage. It would be far more economical and profitable to them if the oil could be left in the ground, and not produced until there is an available market. Taxation of oil stored under such circumstances during the period it must be held until the lessee has an opportunity to market it, amounting in these cases to thousands of dollars per year, is no mere theoretical burden on an agency or instrumentality of the Federal Government. Added to the

other disadvantages of above ground storage, it might very well deter a prudent lessee from producing and storing the oil, and thus incur the risk of loss to himself and his lessor by drainage. The burden of such a tax is more substantial and direct than a tax on the net income derived by the lessee from the sale of oil currently produced. It is very clear that the effect of the tax here imposed upon the instrumentality of the United States is more direct than the tax on net income condemned in the Gillespie case. Of the two taxes, there can be no doubt that the tax on net income is the more remote.

Point Seven

The interest in the land vested in the lessee by the oil and gas leases. Not being subject to taxation by the State without the consent of Congress, the issues and profits of the leases are likewise not subject to such taxation.

Pollock v. *Farmers L. & T. Co.*, 157 U. S. 429;
Carpenter v. *Shaw*, 280 U. S. 363;
Howard v. *Oil Companies*, 247 U. S. 503;
Large Oil Co. v. *Howard*, 248 U. S. 549;
Jaybird Mining Co. v. *Weir*, 271 U. S. 609.

COMMENT:

We submit that had the power of the State to tax the net income without the consent of Congress been sustained, that nevertheless the power to levy the tax now in question, without such consent, must be denied.

The general principle here sought to be applied is well settled. It was applied in Carpenter vs. Shaw. In that case the petitioners were Choctaw Indians of less than half blood, and all restrictions on their allotted lands had been removed by the Act of May 27, 1908. However, the Atoka agreement, under which their lands were allotted, provided that the same should be non-taxable while title remained in the original allottees, not to exceed twenty-one years from date of patent, which could not be abrogated by subsequent legislation. The petitioners leased their allotted lands for oil and gas mining purposes, receiving a share of the oil and gas produced, called "royalty." The State sought to tax the royalty under the provisions of Section 9814, C. O. S. 1921 (Appendix 1), which imposed a tax of 3 per cent of the value of all oil and gas produced, to be paid by the producer (usually a lessee) on all except the royalty interest. It was provided that the owner of the royalty interest should pay the tax thereon. The statute provided that the payment of such taxes should be "in full and in lieu of all taxes * * * upon any property rights attached to or inherent in the right to said minerals, upon leases * * * upon the mining rights and privileges * * * belonging or appertaining to land, upon the machinery, appliances and equipment used in and around any well * * * or any mine * * * and actually used in the operation of such well or mine; and also *upon the oil, * * * during the tax year in which the same is produced,* and upon any invest-

ment in any of the leases, rights, privileges, minerals or property * * * mentioned." The State contended that the tax was not upon the exempt land, from which the oil was produced, but was upon the oil after severance as personal property which had not been exempted from taxation as such. This Court rejected the contention and held that the land being exempt from taxation by the State, the owner's share of the oil produced therefrom was not subject to the tax.

If it be granted, as held in *Indian Territory Illuminating Oil Co.* v. *Oklahoma*, *supra*, that the interest in the land created by leases of restricted Indian lands are not subject to taxation by the State, it must necessarily follow, for the same reason, that the lessee's share of the oil severed and produced is not subject to such taxation.

Section 9814, *supra*, insofar as it related to the tax on the share of the oil other than the royalty interest, was considered by this Court in *Howrad* v. *Oil Companies*, and *Large Oil Co.* v. *Howard*, *supra*. The Supreme Court of the State had construed the statute in *Large Oil Co.* v. *Howard*, 63 Okla. 143, and held that the tax imposed was in lieu of and a substitute for an ad valorem tax on property, among others being, as expressed in the statute, upon the oil in the year in which it was produced, and since the property of a federal agency or instrumentality had been held subject to taxation by the State, that Court concluded that the tax upon the share of the producer (lessee) was

valid, even though the lessee was such agency or instrumentality. This Court, however, in memorandum decisions held the tax was invalid upon the authority of *Choctaw O. & G. R. Co.* v. *Harrison, supra,* and *Indian Territory Illuminating Oil Co.* v. *Oklahoma, supra.* In *Shaffer* v. *Carter,* 252 U. S. 37, this Court stated that it was clear, as a matter of construction that the gross production tax was intended as a substitute for the ad valorem property tax. In Gillespie vs. Oklahoma, this Court reviewed the previous decisions and stated in the opinion that the decision in Indian Territory Illuminating Oil Co. vs. Oklahoma, that such leases were not taxable by the State, went on general principles, and not on the nature of the particular statute. It was also stated that it was not to be assumed that in deciding Howard vs. Oil Companies and Large Oil Co. vs. Howard, that the Court overlooked the difference between the statutes involved in those cases and Choctaw O. & G. R. Co. vs. Harrison. In the opinion it was said: "Those decisions appear to us to have been correct."

The effect of those memorandum decisions is that, the share of the oil of the lessee under such leases, is not subject to ad valorem taxation by the State at least in the year in which it was produced, otherwise the tax levied in lieu of and as a substitute for an ad valorem tax on such oil for such year would have been sustained as valid, at least to the extent that it was a substitute therefor.

Without regard to these decisions, the correctness of

the proposition now asserted, must be apparent on general principles. Certainly it will not now be denied that "the power to tax is the power to destroy." It seems axiomatic that if the power exists in the State to lay an ad valorem tax on the leases as property, the State has it within its power to seriously impair and hinder, if not to destroy the power of the Federal Government to make them. Hence it was that this Court denied the power of the State to so impair or impede the United States in the exercise of its governmental function in *Indian Territory Illuminating Oil Co.* v. *Oklahoma, supra.* The correctness of that decision seems clear. It does not appear that it has been since questioned in any quarter. The only inducement to a lessee to develop the land for oil and gas is the share of the oil and gas he hopes to secure under the terms of the lease.

The only element of actual value of the lease to the lessee is the value of the share of the oil and gas which he receives. An undeveloped oil and gas lease has no value except such as the prospect of discovering oil and gas thereon may give it. A developed lease has such value only as the production secured therefrom and expected to be secured may give it. Generally speaking, oil and gas leases are executed for short terms and the term of the lease depends upon the continuation of production. When the production ceases, the lease terminates and its value is gone. Under the usual terms of an oil and gas lease no rights are given or granted to the land or the use of the surface of

the land except such as are necessarily incidental to the development of the property for oil and gas. If wells are drilled and no production is found, then such rights are valueless. If production is found and the wells become exhausted, the rights under the lease cease to have value. Such is the nature of the leases under which the crude oil in question was produced. From the very nature of the business, each day's operation of a developed and producing lease decreases the value of the lease. The taking of oil and gas is the taking of the substance which gives value to the lease, and when the oil and gas are exhausted the lease terminates and has no vlaue. Hence a tax on the production from the lease is a tax on the only substance which gives the lease value, and is therefore the equivalent of a tax on the lease itself, just as was held by this Court in the case of *Indian Territory Illuminating Oil Co.* v. *Oklahoma, supra,* where the State sought to tax the value of the capital stock of the corporation. To tax the oil produced under a lease, either at the moment of production, or at any subsequent time, amounts in substance and fact to a tax on the lease. To admit the power of the State to tax the share of the lessee of the oil and gas produced, is to admit the power of the State to hamper and impede, if not to destroy, the power of the United States to make the lease, to no less extent or in no less degree than to admit the power to tax the lease itself. There can be no doubt that the State is without power to lay an ad valorem tax on such leases

directly, or by including their value in the value of capital and surplus against which such tax is laid, and is for the same reason without power to impose such tax upon the lessee's share of the oil and gas produced thereunder. So much is settled by the decisions of this Court. In the cases so far discussed, the Court was dealing with a tax on the oil in the year in which it was produced. The principle involved as to a tax imposed in a subsequent year is the same.

The statute (Section 9814, Appendix 1), which was considered in the foregoing cases as applied to taxation of oil in the year in which produced, further provides for taxation in the next and subsequent years, as follows:

> "Oil in storage, asphalt and ores bearing minerals hereinbefore named, mined, produced and on hand at the date as of which property is assessed for general ad valorem taxation for any subsequent tax year shall be assessed and taxed as other property, within the taxing district in which such property is situated at the time."

It is under this provision that the tax authorities of the State assert the right to assess the oil in question for taxation. The time and manner of making the assessment being prescribed by the other statutes quoted in the appendix.

If oil produced by an agency or instrumentality of the Federal Government, on the 2nd day of January of any year and retained by him in its original form throughout the remainder of the year, is not subject to taxation by

the State in any form or manner during that year, without the consent of Congress, as clearly held by the decisions of this Court, for what reason can the same oil become subject to taxation because it is still on hand January first of the succeeding year? For the same causes that the governmental agency found it necessary to produce the oil and hold the oil during the year in which it is produced, he may find it necessary to hold it into the next year. For the same reason that oil produced by such agencies is not subject to taxation by the State in any manner in the year in which it is produced, such oil should not be subject to taxation for any subsequent year while in the hands of the same agency in its original form and prior to sale.

Crude oil or petroleum in its natural state can be put to very little, if any, beneficial use. It must first be processed or refined. The purpose of a non-integrated producer of oil, such as petitioner, is to sell the crude product. Until he sells his production, he has received no benefit from his business. He cannot put the crude oil to any use beneficial to himself. The integrated producer may refine and process his own production, and convert it into products which may be put to beneficial use by himself or others. Transferring the oil from the natural reservoir below ground to an artificial one above ground is not the complete accomplishment of the business of producing oil. It is but an incident. Until his share of the oil is sold, or it is processed and refined, the object of a lessee of land for oil

and gas mining purposes is not accomplished. Storage of the oil produced until it can be sold or otherwise beneficially used, whether it be for a day, a month, or a year or more, is an essential function of the business of producing oil, as much so as drilling the wells and pumping or flowing them. It is obvious that a tax laid upon the lessee of restricted Indian lands with respect to his ownership of his share of the oil produced prior to sale and in its original form, whether assessed a day, a month, or a year or more after its production, is as much a burden on him and interference with the governmental function, as a tax upon the right to drill wells or produce oil, or a tax laid upon such oil at the moment of production. A tax laid upon such oil so produced with respect to its ownership on the first day of January of any subsequent year, is as much within the principles of the decided cases, as a tax laid thereon at the moment of production or at any time within the year it is produced.

While the amount of the tax is immaterial (*Johnson* v. *State of Maryland, supra*), it may be noted that the rate of the tax here complained of is higher than the rate of the tax that was condemned by this Court in *Howard* v. *Oil Companies, supra,* and *Large Oil Co.* v. *Howard, supra.* In those cases the rate of tax was 3 per cent of the value of the oil produced ($3.00 per $100.00), while the rate of tax here sought to be imposed is 34.05 mills on the dollar of valuation, or $3.40 per $100.00 (R. 20).

Any doubt as to the invalidity of this tax should be removed by the decision of this Court in *Jaybird Mining Co. v. Weir,* 271 U. S. 609, which applies the principles of the previous decisions herein discussed to an ad valorem tax on the production in the year after that in which it was produced.

Point Eight

The decision in Jaybird Mining Company v. Weir cannot be distinguished in principle and is decisive of this case.

The questions of law involved in that case and in this case are identical. The essential facts are the same. There are some differences, but not sufficient to afford ground for distinguishing the cases on principle.

In that case the court was dealing with the rights of a lessee under:

(a) A lease on restricted Indian land. An identical situation exists in this case.

(b) The lease was one approved by the Secretary of the Interior under rules and regulations prescribed by him under authority of an Act of Congress, just as in this case.

(c) The object of the lease was to secure the development and use of the restricted Indian land and to secure a percentage of the gross proceeds of the ores mined therefrom for the benefit of an Indian ward of the Government. The object of the leases in this case was to secure the de-

velopment of restricted Indian lands and to secure a percentage of the oil (or its value) produced therefrom for the benefit of the Indian wards of the Government.

(d) The lease was being operated under the supervision of the Interior Department, and the royalty was being accounted for to the Secretary or his agent. Such is provided in the leases involved in this case. (See Lease, R. p. 21, Secs. 2, 4, 5, and 8.)

(e) No question was involved as to the power of the State to impose the gross production tax on the lessee's share of the ores in the tax year in which the same was mined. No such question is involved in this case as to the lessee's share of the oil in the year in which it was produced.

(g) No question was involved in that case as to the power of the State to tax the share or interest of the Indian ward in the ore. No question is involved in this case as to the power of the State to tax the Indian's interest in the oil produced. That share of the oil was acquired by the petitioner under the terms of the lease, and the same was returned, assessed, and taxes thereon paid without protest.

(h) The question involved in that case was the validity of the tax assessed against such lessee, with respect to the ores in mass, on hand on January first of the year subsequent to that in which the same was mined, under that provision of Section 9814, C. O. S. 1921, as follows:

"Oil in storage, asphalt and ores bearing minerals hereinbefore named, mined, produced and on hand at the date as of which property is assessed for general and ad valorem taxation for any subsequent tax year shall be assessed and taxed as other property, within the taxing district in which such property is situated at the time."

The question involved in this case is the validity of the tax, assessed against such lessee with respect to his share of crude oil in the condition in which it was produced and on hand on January first of a year subsequent to that in which it was produced, under the same provision of the statute.

In the former case the court held: (a) that the lessee was an agency or instrumentality of the Federal Government; and (b) that the tax in question was invalid as an attempt to tax an instrumentality used by the United States in fulfilling its duty to the Indians.

In this case the Supreme Court of the State, while not denying that petitioner was an agency or instrumentality of the Federal Government, did not follow the decision of this Court as to the invalidity of the tax, but made an effort to distinguish it because of certain differences in the facts adverted to in opinion, viz:

(1) The ores in the former case were stored on the premises from which the same were mined, while in these cases the oil had been removed from the premises and stored in tanks located on other lands.

(2) The interest of the Indian in the ores had not been segregated in the former case, while in this case settlement had been made for the interest of the Indian in the oil produced.

(3) In this case the oil claimed to be exempt had been commingled in the storage tanks with other oil which it was admitted was subject to taxation.

In the opinion, the State Supreme Court said (R. 41):

> "If the oil sought to be taxed in this case had been stored on the premises from which it was produced and if it had not been separated from the portion belonging to the lessor, under the rule stated in the Jaybird case, it would be exempt from ad valorem taxation."

Do these differences afford grounds for distinguishing the cases in principle? We think not.

(1) *Storage elsewhere than on the leased premises is immaterial.* In the Jaybird Mining case the lessee had provided, at his own expense, wooden bins on the leased premises for storing the ores in mass. It must be assumed that reasons sufficient in the judgment of the lessee made it necessary that the ores be stored. In the case at bar, if the wells were to be produced and the leased lands protected against drainage, thereby protecting the interest of the Indian royalty owner, it was necessary that the oil be stored above ground until it could be utilized by sale or otherwise. Storage of crude oil requires special facilities, such as steel tanks adapted to that use and specially located with refer-

ence to minimizing fire and other hazards. Storage in emergency cases must be made wherever it can be secured. Can it make any difference in principle that it so happened that tanks for storage purposes could be secured and utilized although not located on the leased premises? The burden of providing storage is on the lessee and obviously it would be less burdensome to store the oil on the leased premises if storage were available than to incur the expense of moving the production a distance from the wells and there providing the necessary facilities for storage. The burden for providing storage and transportation to storage is not the burden here complained about. That is a burden properly imposed by the Government upon and assumed by the lessee under the implied, if not the express, covenants of the lease for the protection of the Indian wards of the Government. The burden here complained about is the burden of the tax sought to be imposed by the State, not by the Federal Government nor with its consent. It can make no difference whether the tax be imposed on the oil stored on the lease or on the same oil stored off the lease. In either case it is the same tax and the same burden which hinders and impedes the function of the lessee as a federal agent or instrumentality.

For these reasons the place of storage would not seem important in the application of the principle. If the State can tax oil in one place, it can tax it in another, and the burden attaches in the one case as well as in the other. The

function of a lessee as a federal agency does not end with the drilling of wells and the production of the oil. It is also his duty to save it. It can only be saved by being placed in tanks. A federal agency is as much entitled to protection against any interference or burden imposed by the State in performing the function of storing the oil as he is in performing the function of drilling wells or producing oil. So far as the principle involved is concerned, it is immaterial whether the function of storing the oil is performed upon the leased premises or the adjacent premises or elsewhere.

(2) *It is immaterial that the Indians had no interest in the oil sought to be taxed, and that settlement had been made for their royalty or equitable interests.*

The fact that the lessee had not settled with the Indian lessor for royalties on the ores involved in the Jaybird Mining case at the time of the assessment has no apparent significance so far as the principle involved is concerned. The ores sought to be taxed belonged to the Mining Company, and the State was seeking to tax the ores as property of the Mining Company, and not property of the restricted Indian. In this case the petitioner claims immunity from state taxation on the share of the crude oil (7/8 of the whole) which it acquired at the time of production under the terms of the lease. The petitioner is not claiming immunity on that share of the oil (1/8 of the whole) to which

the Indians were entitled at the time it was produced, and to which it acquired title by settlement with the Superintendent of the Five Civilized Tribes. It has paid the tax assessed on that share so acquired without protest.

Although the oil produced may be commingled in the tanks, the pipe line, or sold as a unit, without a physical separation of the lessor's (landowner's) or royalty interest, from the producer's (lessee's) or working interest, the statute, Sec. 9814, C. O. S. 1921 (Appendix I), which provides for the taxation of crude oil, treats each interest separately. The producer (lessee) is required to report the amount of oil produced, its actual cash value, the amount of the royalty payable thereon, to whom payable, and, if there is a claim of exemption of the royalty interest from taxation, the facts upon which it is based.

The producer (lessee), is only required to pay the tax on his proportion of the production. No tax is imposed on the lessee for the royalty portion of the oil. The law provides (C. O. S. 1921, Section 9814, Appendix I) the lessee

> "Shall at the same time pay to the State Auditor a tax equal to * * * 3 per cent of the gross value of the production of petroleum or other crude or mineral oil * * * less the royalty interest. The owner of any royalty interest shall pay to the State Auditor the tax herein imposed upon such royalty interest * * *."

Hence the question as to whether the owner of the royalty interest in the production had paid the tax, or was liable therefor, could have no bearing on the liability of the

lessee for a tax on lessee's interest in the production. Therefore the question of payment of royalty on the segregation of the royalty portion or interest from the lessee's interest in the production could have no bearing on the liability or non-liability of lessee for taxes on his portion of the production, and cannot be material in weighing the question as to whether the tax sought to be imposed on the lessee in this case is a burden on and hinders the lessee as a government instrumentality.

It may very well be that the lessee's interest is taxable, while the lessor's is not, or *vice versa.* Compare *Carpenter* v. *Shaw, supra.* Whether the lessor's royalty interest is taxable may depend entirely upon whether the land from which the oil is produced is taxable, and whether it is produced by a federal agency or instrumentality is immaterial. Whether the petitioner's interest is taxable depends entirely on whether it is a federal agency or instrumentality, and the effect of the tax upon it as such, and is not governed by whether the land from which it is produced or the royalty interest, is taxable.

In the Howard cases the Court was dealing with the tax on the lessee's share alone, and in the Gillespie case with the lessee's income from his share of the production alone. In no one of these cases was the status of the royalty interest involved in the decision, nor was the decision in any wise turned upon what disposition had or had not been made of that interest.

The portion of the statute providing for taxation of oil for years subsequent to that in which it is produced, has been heretofore quoted. Other statutes, Section 9627, C. O. S. 1921 (Appendix II) requires that such oil be taxed to the proper owner thereof.

The sole question here is whether the petitioner's share of the oil produced to which it became entitled under the terms of the lease may be taxed by the State. Whether the royalty or equitable interest originally belonging to the Indians has been segregated, or settlement made therefor, and whether that interest is now taxable, can have no bearing on the question of whether the petitioner is a federal agency or instrumentality, and a tax upon his share of the production may not be imposed by the State for that reason.

(3) *The fact that the oil in question has been commingled in common storage with other oil is immaterial.*

The statute provides for a tax on personal property to be assessed against the owner thereof on January 1 of each year. It is apparent that fungible goods of different owners in common storage affords no insurmountable obstacle to an assessment against each for the value of his part. All that is necessary is to determine what part belongs to each. If the part of one owner is exempt from taxation, no assessment can be made against him, but that does not render the part belonging to other owners exempt from taxation. For the same reason, if part of the share of the same owner

is exempt from taxation and the remainder is not, the assessment is made against the owner on the taxable part, and the non-taxable part is not taken into consideration. In determining the value of the capital and surplus of a corporation for ad valorem taxation, the value of the part invested in exempt or non-taxable securities or property is not taken into consideration. *In re Oklahoma National Life Insurance Co.*, 68 Okla. 219. See *Indian Territory Illuminating Oil Co.* v. *Oklahoma, supra.* In assessing a tank of oil under Section 9627 (Appendix II), containing oil of two or more owners, the assessor simply determines the amount belonging to each, and makes the assessment against each owner for the value of his share. In the event the tank contains both taxable and non-taxable oil, he determines the amount that is taxable and makes his assessment accordingly.

The doctrine of Confusion of Goods does not extend to goods of the same nature and value, although not capable of an actual separation by identifying each particle, if the portion of each owner is known, and a division can be made of equal proportionate value, as in the case of a mixture of corn, coffee, tea, wine or other article of the same kind and quality. In such cases neither owner loses his property, but each is entitled to his aliquot part of the whole. *Dalton* v. *Bilbo*, 126 Okla. 139, 258 Pac. 274; *Hentz* v. *The Idaho*, 93 U. S. (3 Otto) 575; *Great Southern Gas Co.* v. *Logan Nat. Gas Co.*, 83 C. C. A. 574 (Cer. den. 207 U. S.

590); *Vest* v. *Bond Bros.*, 223 Ala. 552, 137 So. 392; *Ramsey* v. *Rodenburg*, 72 Colo. 567, 212 Pac. 820; *Somers* v. *Kane*, 168 Minn 420, 210 N. W. 287; *St. Paul Broom Co.* v. *Kemp*, 125 Wis 138, 103 N. W. 259.

The fact, therefore, that the oil was stored with other oil did not destroy any right of the owner therein.

In handling, transporting and storing crude oil of two or more owners, it is necessarily mixed in the pipe lines and tanks, yet the courts recognize the rights of the several owners to their respective aliquot parts. The lessee's share (working interest) and the land owner's (royalty interest) share, under a lease, are both produced from the same well, through the same pipes, into the same tanks, and usually delivered to the same pipe line, at the same time, but under a lease which reserves to the lessor a share of the product, the interest of each is regarded as his separate property, and may be the subject of conversion. *Clark* v. *Slick Oil Co.*, 88 Okla. 55, 211 Pac. 497; *W. T. Waggoner Estate* v. *Wichita County* (5th C. C. A.), 3 Fed. (2d) 962; *Elliott Jones & Co.* v. *Waurika Oil Association*, 253 S. W. 601; *Sothern Oil Co.* v. *Waggoner* (5th C. C. A.) 276 Fed. 487; *Smith* v. *Linden* (W. Va.). 71 S. E. 167.

All that was incumbent on petitioners by way of identification of the oil claimed to be immune from state taxation was to show the amount of his share of the oil in the storage tanks that was produced from the restricted Indian lands. This it was able to do to the satisfaction of the

representatives of the State, and the amount was stipulated (R. 20).

Goods moving through a State in interstate commerce cannot be taxed by that State, while goods moving in a State in intrastate commerce may be so taxed. All oil transported by pipe line carrier is mixed and commingled in course of transportation. The fact that a quantity of oil in course of transportation by pipe line may be in part moving in intrastate commerce and part in interstate commerce in a given State on the date as of which property is assessed for ad valorem taxation would not subject the entire amount to assessment and taxation, but at least the aliquot part shown to be moving in interstate commerce could not be assessed and taxed. *Eureka Pipe Line Co.* v. *Hallanan,* 257 U. S. 265; *Peoples Natural Gas Co.* v. *Public Service Commission of Pennsylvania,* 270 U. S. 550. In the case last cited, this Court said:

> "As respects the Pennsylvania gas, we think it must be held to be in intrastate commerce only. Feeding it into the same pipe lines with the West Virginia gas works no change in this regard. Of course after the commingling the two are undistinguishable. *But the proportions of both in the mixture are known and that of either readily may be withdrawn without affecting the transportation or sale of the rest. So, for all practical purposes the two are separable, and neither affects the character of the business as to the other. Eureka Pipe Line Co.* v. *Hallanan,* 257 U. S. 265, 66 L. ed. 227, 42 Sup. Ct. Rep. 101; *United Fuel Gas Co.* v. *Hallanan,* 257 U. S. 277, 281, 66 L. ed. 234, 239, 42 Sup. Ct.

Rep. 105. And see *Hallanan* v. *Eureka Pipe Line Co.*, 261 U. S. 393, 67 L. ed. 715, 43 Sup. Ct. Rep. 414; *Hallanan* v. *United Fuel Gas Co.*, 261 U. S. 398, 67 L. ed. 718, 43 Sup. Ct. Rep. 416."

CONCLUSION

There are decisions which hold that the immunity of agencies and instrumentalities of the Federal Government does not extend to the property privately owned by the agency although employed in the execution of the agency. Under that rule the privately owned machinery and equipment of the lessee used in drilling wells and producing and saving oil and gas would be subject to taxation. But it is not the form of the tax, whether a property tax or an occupation tax, which necessarily controls. The rule that the property of the government instrumentalities is not immune from state taxation will not be mechanically applied, regardless of the consequences to the operations of the Government. Since it appears both on reason and authority that the tax here involved, though in form an ad valorem tax upon property, does burden the petitioner as an agency or instrumentality of the Federal Government, and retards and impedes the performance of the governmental function of fully protecting the Indian wards in securing the development and operation of their lands for oil and gas through

the instrumentality of leases for a share of the product, the tax must be held invalid.

Respectfully submitted,

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APPENDIX

Relevant Statutes

I.

Section 9814, Compiled Oklahoma Statutes, 1921 (Session Laws Oklahoma, 1916, p. 102. Sec. 12434, Oklahoma Statutes, 1931):

"Every person, firm, association or corporation engaged in the mining or production within this State of asphalt or of ores bearing lead, zinc, jack, gold, silver or copper or of petroleum or other crude oil or other mineral oil or of natural gas, shall within thirty days after the expiration of the quarter-annual period ending on the last day of March, A. D. 1916, and of each quarter-annual period thereafter expiring respectively, on the last day of June, September, December and March of each year, file with the State Auditor, a statement under oath, on forms prescribed by him showing the location of each mine or oil or gas well operated by such person, firm, corporation or association during the last preceding quarter-annual period; the kind of such mineral, oil or gas produced; the gross amount thereof produced, and the actual cash value thereof at the place of production; the amount of the royalty payable thereon, if any, to whom payable and whether it is claimed that such royalty is exempt from taxation by law, and the facts on which such claim of exemption, if any, is based; and such other information pertaining thereto as the State Auditor may require, and shall at the same time pay to the State Auditor a tax equal to one-half of one per centum of the gross value of asphalt and of ores bearing lead, zinc, jack, gold, silver and copper produced, less the royalty interest, and equal to three per centum of the gross value of the production of petroleum or other crude or mineral oil and of natural gas, less the royalty interest. The

owner of any royalty interest shall pay to the State Auditor the tax herein imposed upon such royalty interest within the time and in the manner provided by this Act.

"The tax hereby declared shall also attach to and is levied on what is known as the royalty interest except such royalty interest of the State of Oklahoma or such royalty interests as are exempted from taxation under the laws of the United States and the amount of the tax on the royalty interest shall be a lien on such interest.

"The State Auditor shall have power to require any such person, firm, corporation or association engaged in mining or the production of such asphalt, mineral ores aforesaid, petroleum or other crude oil or other mineral oil and natural gas or owner of any royalty interest therein to furnish any additional information by him deemed to be necessary for the purpose of correctly computing the amount of said tax and to examine the books, records and files of such person, firm, corporation or association and shall have power to examine witnesses, and if any witness shall fail or refuse to appear and testify at the summons or requests of the State Auditor, said State Auditor shall certify the facts and the name of the witness so failing and refusing to appear and testify or to produce any book, record or file to the district court of this State having jurisdiction of the party, and said court shall thereupon issue a summons to said party to appear and give such evidence and produce such books, records and files as may be required and upon failing to do so, the offending party shall be punished as provided by law in cases of contempt.

"The State Auditor shall have power to ascertain and determine whether or not any return herein required is a true and correct return of the gross products and of the value thereof of such person, firm, corporation or association engaged in the mining or production of asphalt and ores bearing minerals afore-

said and of petroleum or other crude oil or mineral oil and of natural gas, and if any person, firm, corporation or association has made an untrue or incorrect return of the gross production or value thereof, as hereinbefore required, or has failed or refused to make such return, the said State Auditor shall ascertain the correct amount of either, and compute said tax.

"The payment of the taxes herein imposed shall be in full and in lieu of all taxes by the State, counties, cities, towns, townships, school districts and other municipalities upon any property rights attached to or inherent in the right to said minerals, upon leases for the mining of asphalt and ores bearing lead, zinc, jack, gold, silver or copper or for petroleum or other crude oil or other mineral oil or for natural gas upon the mining rights and privileges for the minerals aforesaid belonging or appertaining to land, upon the machinery, appliances and equipment used in and around any well producing petroleum or other crude or mineral oil or natural gas, or any mine producing asphalt, or any of the mineral ores aforesaid and actually used in the operation of such well or mine; and also upon the oil, gas, asphalt or ores bearing minerals hereinbefore mentioned during the tax year in which the same is produced, and upon any investment in any of the leases, rights, privileges, minerals or property hereinbefore in this paragraph mentioned or described; but any interest in the land other than that herein enumerated, and *oil in storage*, asphalt, and ores bearing the minerals hereinbefore named, mined, produced and on hand at the date as of which property is assessed for general and ad valorem taxation for any subsequent tax year shall be assessed and taxed as other property within the taxing district in which such property is situated at the time.

"The State Board of Equalization, upon its own initiative, may, and upon complaint of any person who claims that he is taxed too great a rate hereunder, shall, take testimony to determine whether the taxes

herein imposed are greater, or less than the general ad valorem tax for all purposes would be on the property of such producer subject to taxation in the district or districts where the same is situated, including the value of oil, gas, or mineral lease, or of the mining or mineral rights, the machinery, equipment or appliances used in the actual operation of, in and around any such well or mine, the value of the oil, gas, asphalt or any of the said mineral ores produced and any other element of taxable value in lieu of which the tax herein is levied. The said board shall have power and it shall be its duty to raise or lower the rates herein imposed to conform thereto. An appeal may be had from the decision of the State Board of Equalization thereon, by any person aggrieved, to the Supreme Court, in like manner and with like effect as provided by law in other appeals from said board to said Court; provided, that after such tax has been collected and distributed, or paid without protest, no complaint with reference to rate thereof shall be heard or considered."

II.

Section 9627, Compiled Oklahoma Statutes, 1921 (Sec. 14, Ch. XXXVIII, Session Laws Oklahoma, 1909. Sec. 7334, Revised Laws of Oklahoma, 1910. Sec. 12606, Oklahoma Statutes, 1931):

"It shall be the duty of the township assessor of any township in which tanks or tank farms for storage of crude petroleum are located to assess as other property is assessed, to the proper owners at the fair cash value, as hereinbefore defined, any and all such tanks and the contents thereof; together with all boilers, tools, pipes, pumps, fixtures and appurtenances of every kind used by or for the purpose of producing, pumping, distributing or storing any crude petroleum or natural gas; and for the purpose of enabling him to make a correct assessment thereof, he shall go upon

and have access to every plant, pump station, receiving station, tank farm or office where information regarding any such property may be obtained."

III.

Sections 9660, 9662, Compiled Oklahoma Statutes, 1921 (Session Laws, Oklahoma, 1910-1911, p. 331. Secs. 7730, 7733, Oklahoma Statutes. 1931):

Sec. 9660: "The office of county assessor is hereby created. There shall be appointed by the Governor, before the first day of January, 1912, a county assessor in and for each county of this State, whose duties and compensation shall be as hereinafter provided, and whose term of office shall commence on the first Monday in January, 1912, and continue until the first Monday in January, 1913, or until his successor is elected and qualified. A county assessor shall be elected at the general election in 1912, and every two years thereafter, and shall assume the duties of his office the first Monday in January following his election.

Sec. 9662: "The county assessor provided for in this act shall have the same powers and perform the same duties in assessing property and making the returns thereof, in taking the assessment, and gathering statistical information as is now provided by law, not in conflict with this act, for township assessors." * * *

IV.

Section 9574, Compiled Oklahoma Statutes, 1921 (Sec. 12317, Oklahoma Statutes, 1931):

"All property in this State, whether real or personal, including the property of corporations, banks and bankers, except such as is exempt, shall be subject to taxation. * * *"

Section 12581, Oklahoma Statutes, 1931 (Session Laws, 1923-1924, Ch. 29, Amending Sec. 9960, Compiled Oklahoma Statutes, 1921):

"All taxable property shall be listed and assessed each year at its fair cash value, estimated at the price it would bring at a fair voluntary sale, in the name of the owners thereof on the first day of January of each year, as soon as practicable on or after the fifteenth day of January, including all property owned on the first day of January of that year * * *."

V.

Act May 27, 1908 (35 U. S. Stat. L. [Pt. 1] 312):

"Be It Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That from and after sixty days from the date of this Act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in

part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this Act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this Act. No restriction of alienation shall be construed to prevent the exercise of the right of eminent domain in condemning rights of way for public purposes over allotted lands, and for such purposes sections thirteen to twenty-three inclusive, of an act entitled, 'An act to grant the right of way through Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes,' approved February twenty-eighth, nineteen hundred and two (Thirty-second Statutes at Large, page forty-three) are hereby continued in force in the State of Oklahoma.

"Sec. 2. That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: Provided, that leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: And provided further, That the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this Act, shall include all males under the age of twenty-one years and all females under the age of eighteen years.

"Sec. 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: Provided further, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one: but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: Provided further, That the provisions of section twenty-three of the Act of April twenty-sixth, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section."

VI.

Act May 10, 1928 (Chap. 517, 45 Stat. L. 495), as amended by Act February 14, 1931 (Ch. 179, 46 Stat. L.):

"Section 3. That all minerals produced on or after April 26, 1931, from restricted allotted lands of members of the Five Civilized Tribes in Oklahoma, or from inherited restricted lands of full-blood Indian heirs or devisees of such lands, shall be subject to all State and Federal taxes of every kind and character the same as

those produced from lands owned by other citizens of the State of Oklahoma; and the Secretary of the Interior is hereby authorized and directed to cause to be paid, from the individual Indian funds held under his supervision and control and belonging to the Indian owners of the lands, the taxes so assessed against the royalty interests of the respective Indian owners in such oil, gas. and other mineral production:

"Provided, That nothing in this Act shall be construed to impose or provide for double taxation and, in those cases where the machinery or equipment used in producing oil or other minerals on restricted Indian land are subject to the ad valorem tax of the State of Oklahoma for the fiscal year ending June 30, 1931, gross production tax which is in lieu thereof shall not be imposed prior to July, 1931."